IN THE HIGH COURT OF BOMBAY AT GOA

FIRST APPEAL NO. 89 OF 1996

1. Shri Gopal Balcrishna Fallary,
   aged 55 years, and his wife,

2. Smt. Bharati Gopal Fallary,
   aged 50 years, both landlords,
   r/o House No.E-20,
   Martires Dias Road, Malbhat,
   Margao, Goa. ... Appellants.

VERSUS

1. State of Goa,
   through Chief Secretary,
   Sachivalaya, Panaji, Goa.

2. The Deputy Conservator of
   Forest, Cashew Division,
   Panaji, Goa.

3. The Deputy Conservator
   of Forest, South Goa,
   Margao.

4. The Directorate of Land
   Survey, Panaji, Goa. ... Respondents.

Shri M.S. Usgaoncar, Senior Advocate with Shri Sudesh Usgaonkar, Advocate for the Appellants.

Mr. H.R. Bharne, Government Advocate for the Respondents.

CORAM: N. A. BRITTO, J.

DATE OF RESERVING THE JUDGMENT: 25.03.2004
DATE OF PRONOUNCING THE JUDGMENT: 6.04.2004

J U D G M E N T:

This appeal is directed against the Judgment/Decree dated 11.6.1996 of the learned Civil Judge, Senior Division, Quepem.

2. The appellants herein were the plaintiffs in SCS

No.2/1988/A. The dispute between the plaintiff and the defendants was regarding the land surveyed under No.35 of Village Villiena which has been referred to by both the parties to the suit as Survey No.35/1.

3. The parties hereto are referred to in the names as they appears in the cause title of the suit.

4. Briefly stated, it was the case of the plaintiff that they are the owners of the property known as "Mandabem" having Land Registration No.2124 situated at Villiena village of Sanguem Taluka bounded on the east by the property Irauila of Vithoba Poi Kakode; on the west by property Velpechem Tican of Velips; on the south by property Nouramolla of said Vithoba Kakode; and on the north limit of village Bhati.

5. The plaintiffs stated that they reside at Margao and rarely go to Villiena and the plaintiff No.1 when he visited the property Mandabem about 3/4 years back, he came to know that the Government had clear felled forest produce and planted cashew saplings in the said Survey No.35/1 which forms part of the property Mandabem belonging to the plaintiffs and the defendants had no right, title and interest in the said portion. The plaintiffs stated survey No.35/1 was wrongly

surveyed in the name of the Government in the occupants column of Form I and XIV of the said village and the survey was promulgated in the year 1986. The plaintiff stated that the said survey number forms part and parcel of the property Mandabem situated at Villiena and, as such the name of the Government has to be deleted and in its place the name of the plaintiff has to be entered in the said column of the survey.

6. The plaintiffs stated that notice dated 10.7.1987 under Section 80 C.P.C. was issued to the defendants and defendant No.3 by letter dated 20th July, 1987 informed the defendant No.2 that the matter is pertaining to defendant No.2 and that the defendant No.2 by letter dated 8.9.1987 informed the Advocate of the plaintiffs that the Forest Department is having cashew plantation in the said area and that there is no question of encroachment of Forest Department in anybody's private land. The plaintiffs stated that the said letter dated 8.9.87 gave cause for the plaintiffs for entitling for a declaration of title so also for deleting the name of the Government from the said column of the said survey of village Villiena and for possession of the said property under Survey No.35/1. The plaintiffs stated that the cause of action arose on or about three years back and in the year 1986 when the

said survey was promulgated and later on when the said letter dated 8.9.87 was received by defendant No.2.

7. On the other hand it was the case of the defendants that Survey No.35/1 of Villiena was known as "Vagpad" which property was declared as National Forest by Gazette dated 11.1.1951 Series II and the defendants auctioned the coupes in the property in the year 1977-78 and the same was felled by the Government contractor in the same year. The defendants stated that the cashew plantation was raised in the year 1978-79 and cashew plantation auction from the said property has been done for the last 5 to 6 years. The defendants denied that the said property formed portion of the property Mandabem. The defendants further stated that the plaintiffs do not have any right, title or interest in Survey No.35/1. The defendants denied that they violated the property rights of the plaintiff and stated that the plaintiffs have no right whatsoever in the said property. The defendants denied that the survey was wrongly entered in the name of the Government. The defendants denied that the plaintiffs were entitled to get the name of the Government deleted from the survey records and stated that the Government was the rightful owner of the property. The defendants denied that the cause of action had arisen three years

back or at any other time and further stated that the plaintiffs had no cause of action to file the present suit.

8. In support of their case the plaintiffs examined plaintiff No.1 (p.W.1) and Engineer Shri Vikas Dessai (P.W.2). The defendants examined the Range Forest Officer Shri Godinho (D.W.1) and Forest Guard Shri Dessai (D.W.2).

9. The plaintiffs have produced their document of title namely certificate of inscription and description PW1/A. The plaintiffs also produced a survey plan at Exh.PW1/B which shows that Survey No.35 has on its northern side the boundary of village Batty. The defendants produced their document of title namely the said Gazette with names of Forests enlisted by the Government. The same shows that as there was confusion as regards to the designation of State Forest in the Goa District, it was necessary to adopt officially more suitable names. The said Gazette shows that there is a National Forest belonging to the Government known as "Vagpad" situated in " Patelado" of Batty in village Villiena. The defendants also produced among other documents a proclamation issued under Section 6 of the Indian Forest Act 1927 giving the area of the said

"Vagpad – I Forest as 1020.00 hectares and calling upon all persons claiming any right in or over the said land or forest to remain present and to state the nature of such right with particulars, etc. Admittedly the plaintiffs have not filed any representation or statement of their claim pursuant to the said Notification issued under Section 6 of the Indian Forest Act 1927.

10. The first aspect which needs to be considered is the evidence of P.W.2 Vikas Dessai. As can be seen from the occupation given by him, P.W.2 Shri Dessai is a Civil Engineer. As rightly pointed out on behalf of the defendants, P.W.2 has not claimed to be a Surveyor who is conversant with surveying properties and therefore it is obvious that he cannot be termed to be an expert nor has he claimed any expertise in surveying properties. The plaintiffs have pleaded that their property is known as "Mandabem", but P.W.2 has stated that he was shown a document of the property known as "Nenden". He claims to have seen the boundaries but does not say whether he saw the said boundaries in loco or as per the document given to him. If the plaintiffs have stated that their property is bounded on the south by the property of Vitoba Kakode, P.W.2 Shri Dessai has stated that the property on the south is that of one

Pai. According to P.W.2 the plaintiff's property falls part in Survey Nos.30, 32, 33, 34 and entire Survey No.35. The plaintiffs themselves did not plead under what survey numbers their property "Mandabem" was surveyed. But P.W.1 stated that the other survey numbers of their property are 33, 34 and others, but he did not remember them all, but all the survey numbers were touching one another. In cross-examination P.W.2 Shri Dessai has stated that he could not tell which sub-division of Survey No.32 fell in the property of the plaintiffs and since he did not mention the area, he could not say howmuch area of Survey No.32 belonged to the plaintiffs and in further cross-examination he conceded that some portion of survey No.32 was paddy field but that he did not remember whether the names of the tenants were shown in the tenants column of Survey No.32. Likewise P.W.2 Dessai stated that he could not tell which sub-divisions of survey No.34 belonged to the plaintiffs which lie on the west of survey No.34 and again conceded that a smaller portion of survey No.34 was also paddy field. He stated that no part of Survey No.32 and 34 touched the boundary of village Batty. He further stated that he did not prepare any report and conceded that the plaintiffs' document did not mention any area. In further cross-examination he stated that the boundary marks were shown by the

plaintiffs and the same were confirmed by him. One fails to understand that in case the plaintiffs themselves do not know into how many survey numbers their property is surveyed, how could the plaintiffs ever show the boundary marks to P.W.2 Shri Dessai? Again, P.W.2 Shri Dessai stated that plaintiff NO.1 told him survey numbers of his property. I have already stated that the plaintiffs themselves do not know into how many survey numbers their property "Mandabem" has been surveyed into and if they knew about the same, the plaintiffs would have certainly mentioned the said survey numbers in the plaint or P.W.1 would have deposed regarding the said survey numbers before the Court. If P.W.2 Shri Dessai calls himself an expert, the least thing he could have done is draw a plan of the property "Mandabem" as claimed by the plaintiffs.

11. It has been submitted by learned Sr. Counsel Shri Usgaonkar that the identification of the entire property was not in dispute. However, the fact remains that the plaintiffs have claimed Survey No.35 as part of their property and therefore it was necessary fo the plaintiffs to have shown the extent of their property and also to have mentioned the other survey numbers which were included in their property Mandabem.

Suffice to observe that P.W.2 Dessai has shown no expertise in identifying the property claimed by the plaintiffs with reference to the survey records. His evidence therefore deserves to be rejected.

12. The second aspect which requires consideration is regarding possession of property surveyed under No.35. According to P.W.1 Shri Gopal Falari it is the Government who is in possession of the said land. He has also admitted that the Government has cultivated cashew plantation in the said property which, according to the Government, was done in the years 1978-79. The survey records namely Form I and XIV of survey No.35 is in the name of the Government. Admittedly, the said survey was conducted somewhere in the year 1972-74 and one could presume that the survey records were prepared based on actual possession of the Government. Section 105 of the Land Revenue Code 1968 provides that an entry in the Record of Rights, and a certified entry in the registry of mutation shall be presumed to be true, until the contrary is proved or a new entry is lawfully substituted therefor. The plaintiffs have never claimed in their plaint that they have been in possession of the disputed property at any time and all that the plaintiffs pleaded was that the plaintiff No.1 visited the property "Mandabem" somewhere in the years

1984/85 when he came to know that the Government had clear felled the forest produce. In case the plaintiffs had visited the property "Mandabem" claimed by them earlier, the plaintiffs would have come to know that the disputed land was being possessed by the Government as part of their forest with definite boundary marks like cairns from the year 1967, as stated by D.W.2 Shri Dessai. The plaintiffs would have also come to know that forest produce from the same was cut in the years 1978-79 to make place for cashew plantation. The plaintiffs have failed to rebut the presumption regarding possession available to the defendants by virtue of section 105 of the Land Revenue Code. From the evidence led on behalf of the defendants, it could be safely concluded that Survey No.35 has been in possession of the defendants as part of their forest "Vagpad" situated at Villiena at least from the time the said forest was notified as a National Forest by virtue of Gazette Notification dated 5.12.1950. The plaintiffs averment and the statement of P.W.1 that in the year 1984 he happened to go to his property and noticed that some of their trees were cut therefore cannot be believed and it is obvious that the same was made by the plaintiffs only to give them a cause of action for filing the suit. The fact that no boundaries of the forest were mentioned in the Gazette

Notification dated 5.12.1950 is of no assistance to the case of the plaintiffs.

13. The third aspect which needs to be considered is regarding title. Admittedly survey No.36 of village Villiena is also bounded on the north by village Batty. Admittedly the said survey No.36 is forest land and it is not the case of the plaintiff that their property Mandabem is bounded on the east by Government land or for that matter survey No.36 belonging to the Government. On the contrary, the case of the plaintiffs that on the east there is a property of Vitoba Poi Kakode which property the plaintiffs have failed to identify. As far as the plaintiffs are concerned, the southern boundary of their property is again the boundary of Vitoba Kakode which the plaintiffs have failed to identify and only because D.W.2 has stated that to the south of survey No.35 is private property belonging to the plaintiffs, does not mean that the plaintiffs have identified their southern boundary in relation to their property Mandabem. The entire case of the plaintiffs is based on their title document which shows the property "Mandabem" on the northern boundary as village Batty and likewise the survey plan shows the northern boundary of survey No.35 as village Batty. If by the said parameters survey

No.35 belongs to the plaintiffs, then survey No.36 could also belong to them because survey No.36 has also on its northern side village Batty as its boundary but it is not the case of the plaintiffs that survey No.36 belongs to them. As already stated P.W.1 does not even know into how many survey numbers the property of the plaintiffs have been surveyed. According to P.W.1 Falari their property is surveyed under Nos.33, 34 and others which he does not know, but according to P.W.2 the property of the plaintiffs is surveyed under Nos.30, 32, 33 and 34. At the same time it was suggested to D.W.1 Godinho that the property of the plaintiffs consisted of survey No.30 (part), 33 (part) and 34(part). Likewise it was suggested to P.W.2 Shri Dessai, survey No.35/1 on the eastern and western sides belongs to the Forest Department. Different stands taken by the plaintiff at different stages only show that the plaintiffs are not at all aware about the extent of the property claimed by them. In fact P.W.1 Falari has admitted that he does not know the total area of his property. P.W.1 Falari does not even know whether there is a road on the western side of his property when the survey plan (Exh.PW1/B) shows the existence of the road on the western side of survey No.35. P.W.1 Falari does not know what is the area of survey No.33 and for that matter in whose name it has

been recorded. Likewise he does not know the area of survey No.34 or in whose name it is recorded. He also does not know the area of survey No.35.He admits that there is a paddy field on the eastern side of his property but he does not know in which survey number the same is situated. The plaintiffs have failed to identify the western, southern and eastern boundaries of the property claimed by them. It is therefore not possible with the help of only one boundary namely that of village Batty is on the north of the property claimed by the plaintiffs to jump to the conclusion that survey No.35 is part of the property claimed by the plaintiffs. The plaintiffs have failed to show as to how and when the property claimed by them which was of coconut and paddy cultivation came to be forest land. Suffice to observe that the plaintiffs have failed to prove that survey No.35 is part of the property Mandabem claimed by them.

14. Now I will proceed to consider the submissions made on behalf of the plaintiffs at the time of arguments. The plaintiffs inter alia prayed for a declaration in terms of prayer (a) of the plaint which prayer, on the plaintiffs' own showing, is clearly time barred. I say so because P.W.1 himself has stated that he came to know about the possession of the Government

in the year 1984 and the suit has been filed on 7.1.88 after a period of more than three years. However, it has been submitted on behalf of the plaintiffs that the main relief of the plaintiffs is recovery of possession based on title of the plaintiffs and that the suit of the plaintiffs is basically for recovery of possession. There is no doubt about it. Reliance is placed In the case of **Corporation of the City of Bangalore v. M. Papaiah and another** reported in A.I.R. 1989 S.C. 1**809.** It was observed by the Hon'ble Supreme Court that a suit cannot be dismissed on the ground that the relief of declaration of title and possession has not been specifically mentioned in the plaint. In the case of **Uchhab Gouda and others v. Ganesh Panda** (A.I.R. 1963 Orissa, 71) it was observed that it is not in the least necessary for a plaintiff in a suit for possession to claim a declaration. Indeed declarations in the true sense are rarely required. The plaintiff should only allege the facts necessary to establish his title and that the defendant is wrongfully in possession. If he goes on to claim, in the manner so beloved of pleaders, a declaration of title in addition to an order for possession, the Court may and should treat the case as a claim for possession pure and simple and ignore entirely the claim for a 'declaration of title'. In the case of **The State of Maharashtra and**

others v. Glaxo Laboratories (India) Pvt. Ltd. and another (1979 Bom. C.R.321),the Division Bench of this Court has held that a suit for a declatory decree can only be a suit of the type specified in the said Section 34, and merely because a plaintiff choses in the plaint to ask for declarations which are really answers in his favour to issues which arise in the suit does not make that suit a declaratory suit or a suit for a declaratory decree. Again, in the case of **Tanaji M. Shetkar vs. Rukmini P. Shetkar,** (1991 (2) GLT 153), it has been held that there is no necessity to seek declaration in a suit for injunction based on title. Therefore it could be conceded that prayer (a) of the plaint as far as the plaintiffs were concerned was not of much consequence, the plaintiff's suit being one filed for recovery of possession. That should take us to Article 65 of the Indian Limitation Act 1963 which provides 12 years for a suit for possession of immovable property or any interest therein based on title from the date when the possession of the defendant becomes adverse to the plaintiffs.

15. Learned Advocate Shri Usgaonkar has submitted that the suit of the plaintiffs is within 12 years, the same having been filed on 7.1.88 after the plaintiffs came to know about the defendants' possession in the

year 1984. Learned Advocate Shri Usgaonkar has placed reliance on the case of Indira v. Arumugam reported in A.I.R. 1999 S.C. 1549).

16. In the above case the Hon'ble Supreme Court has observed that when the suit is based on title for possession, once the title is established on the basis of relevant documents and other evidence unless the defendant proves adverse possession for the prescriptive period, the plaintiff cannot be non-suited. However, neither the observations of the Supreme Court nor the submission made on behalf of the plaintiffs is attracted to the facts of this case. I have already concluded that the defendants are in possession of the disputed land - survey No.35 as part of their forest at least from the time the forest was notified as a National Forest and thereafter, if not earlier from the time the survey records were prepared in the years 1972-74. I have also concluded that the averment of the plaintiffs that the plaintiff no.1 visited their property 3 - 4 years prior to the filing of the suit was an averment which was absolutely unsubstantiated and/or made with a view to make out a cause of action for filing the suit. I have also concluded that the plaintiffs were never in possession nor they claimed to be in possession of the disputed

survey No.35 of Villiena village which has always been in possession of the defendants as part of their forest "Vagpad" plaintiffs that the suit filed by them is within 12 years cannot be accepted.

17. On behalf of the plaintiffs it is also submitted that the defendants were not entitled to take a plea that the forest "Vagpad" was a reserved forest.

18. Reliance has been placed on behalf of the plaintiffs in the case of **Ram Sarup Gupta (dead) by L.Rs., v. Bishun Narain Inter College and others** (A.I.R. 1987 S.C., 1242) wherein the Hon'ble Supreme Court has observed that it is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. However the said principle, in my opinion, cannot be applied to the facts of this case. I say so because the defendants pleaded that survey No.35 was known as "Vagpad" which was declared as a National Forest as published in Gazette dated 11.1.1951. If at all a copy of the Notification issued under Section 6 of the Indian Forest Act 1927 has been produced by the defendants, it is only produced to show that what was declared as a National Forest was being notified as reserved forest. As already stated, the plaintiffs have not filed any

claim pursuant to the said Notification issued under Section 6 of the Indian Forest Act, 1927, though till date no order has been issued as contemplated under Section 20 of the said Indian Forest Act 1927.

19. In conclusion it may be observed that the plaintiffs have failed to prove both title and possession to survey No.35 of Villiena village, being part of their property Mandabem.

20. For the above reasons, I find that there is no merit in this appeal and consequently the same is hereby dismissed with costs.

N. A. BRITTO, J.

sl.